

# Habeas Corpus — A Protean Writ and Remedy\*

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"The Story of Habeas Corpus" is one of the evolution from obscurity of the great writ for the protection of the inalienable liberty of man. It has already been told in part.<sup>1</sup>

Essential in understanding of the modern writ of habeas corpus, now appropriated to the great writ *ad subjudiciendum* is a study of the history of the various writs of habeas corpus, and of the changes that have occurred by which the great writ continues in vigor, while all of the other writs of habeas corpus have fallen into rare use or complete disuse and their names become almost obsolete. Their names remain in the books, but "habeas corpus" standing alone today almost invariably means the great writ. The objects and functions of the other writs, the auxiliary and processive writs of habeas corpus remain, but are accomplished by modern, if not always simpler, forms of procedure and under other names.

No one knows the origin of the various writs of habeas corpus, or the first procedures applicable to them, either of the great writ or of the other writs; or how much one may be older than another. Scholars of earlier centuries who wrote about these writs did not, if they knew, record the geneses of the writs or of the remedy which we call the great writ.

The early writers tell us meagrely of the appropriate procedures and somewhat less than generously of the changes which occurred in method, objects, and reach of the various writs. Mr. Jenks says: "This perhaps is the most embarrassing discovery, the more one studies the ancient writs of habeas corpus (for there were many varieties of the article) the more clear grows the conviction

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<sup>1</sup> *The Story of Habeas Corpus* is the title of an essay by Edward Jenks in 18 QUARTERLY L. REV. 64 et seq. (1902). He says: "There is no readily accessible book . . . , which gives in a succinct and intelligible form, an account of this famous bulwark of our liberties." His story cannot be bettered, but it does not reach American, and especially federal, laws and practices. It is not accessible in most law libraries, and this is but an attempt to sketch and supplement it.

that, whatever may have been its ultimate use, the writ Habeas Corpus was originally intended not to get people out of prison, *but to put them in it.*" (Italics his.)

In *Matter of Jackson*,<sup>2</sup> Judge Cooley says that "the writ is so ancient that its origin is lost in obscurity;" and that the Habeas Corpus Act of 31 Car. II "introduced no new principle."<sup>3</sup> Hallam,<sup>4</sup> speaking only about habeas corpus *ad subjudiciendum* under 31 Car. II, c. 2, wrote: "It is a very common mistake . . . to suppose that this statute of Charles II enlarged in a great degree our liberties, and forms a sort of epoch in our history." That act applied only when one was imprisoned on a charge of crime. Hallam continues that "it was always in his power to demand of the court of King's Bench a writ of habeas corpus *ad subjudiciendum*." It was doubted whether the Common Pleas could allow that writ, or whether a single judge of the King's Bench could do so. The Act removed some doubts and effected other improvements in the remedy. A doubt whether the Common Pleas could issue habeas corpus (*ad faciendum*?) to bring up a prisoner to be admitted to bail on a misdemeanor charge was resolved by issuance of the writ for that purpose, in *Jones's Case*,<sup>5</sup> the argument have been that only the King's Bench had such authority in a criminal case; but *Jones's Case*<sup>6</sup> was one of a writ in his favor to admit him to bail, not one to discharge him from illegal imprisonment, although that approached or foreshadowed use of habeas corpus *ad subjudiciendum* in favor of liberty.

It may be inferred that the great writ is more recent in origin than the other auxiliary and processive writs; or, if not younger, that it was infrequently used prior to 31 Car. II (1679) while they had been often used. Certainly, if the right to the great writ had been well established, had been procedurally efficient, and had been in common use, there would have been little occasion for 16 Car. I, c. 10 (1640) which in turn proved dilatory and abortive. The cause and occasion for 31 Car. II, c. 2 (1679) was the futility of 16 Car. I, c. 10, along with other incentives. Those acts sought to make effective for all men in prison, and in need of relief, the great writ. There is abundant historical reason to believe that during the times of the Tudor and the Stuart kings the great writ was not in common or frequent use. Any ordinary person in prison

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<sup>2</sup> 15 Mich. 417, 436 (1867).

<sup>3</sup> Citing HALLAM, CONST. HIST., ch. 13; Beeching's Case, 4 B. & C. 136, in which case the King's Bench issued habeas corpus on common law principles, although the case was not criminal within the meaning of 31 Car. II, c. 2, nor open to habeas corpus under that statute.

<sup>4</sup> HALLAM, CONST. HIST., 617 *et seq.*

<sup>5</sup> 2 Mod. 198, about 1654 before 31 Car. II, c. 2.

<sup>6</sup> *Jones's Case*, *supra*.

in their days would have had little hope of obtaining the great writ or liberty thereby.

We do know that there have been many procedural changes and adaptations of writs of habeas corpus for use as process in pending cases. The varying kinds of the writ and their emergence in reports at different times show this. We do know that Magna Carta guaranteed men against imprisonment contrary to the law of the land or, as we say, without due process of law. We know—it is a maxim—that this right of liberty must have had a remedy, and, if none was known, one must have been invented after 1215; and that one was invented before 1640 or 1679. The Statutes of 16 Car. I and 31 Car. II may not be construed as inventions of what they professed to confirm and protect. The great writ must have been contrived in that interim. Hallam<sup>7</sup> narrates that in the case of a freeman detained in prison on a criminal charge “it was always,” that is before 1679, in his power to demand of the King’s Bench a writ of habeas corpus *ad subjudiciendum*, directed to the prison having custody and commanding the keeper to bring up the prisoner with the warrant of commitment, “that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge.” A very little stretch was necessary to make out of this a remedy where, after an illegal or fatally invalid conviction and sentence, the prisoner had been committed for punishment. One Jenkes (not Edward Jenks) had sought this remedy in the Quarter Sessions, and had been relegated to the King’s Bench which procrastinated and defeated his writ in 1676. Earlier but after 1640 several bills to make more secure the right to habeas corpus had failed in Parliament. Hallam thinks that Jenkes’ frustration was not the main producing cause of the Act of 1679. One case is reported of habeas corpus in the Common Pleas in favor of a prisoner in jail on a misdemeanor charge to bring him in and admit him to bail. It was objected that in a criminal case only the King’s Bench could afford that relief, but that was overruled on the ground that misdemeanor was not a criminal case in this sense; and the Common Pleas granted the writ.<sup>8</sup> Of course this was not a habeas corpus *ad subjudiciendum* in the modern sense in relief of a prisoner invalidly convicted and in prison under sentence.

The protean traits of these various writs became more marked when habeas corpus came to America and became part of the common and statute laws of the several states and of the United States. They took it as a heritage of law and to some extent made it statu-

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<sup>7</sup> See note 3, *supra*.

<sup>8</sup> Jones’s Case, 2 Mod. 198, 28 & 29 Car. II, about 1654 (14 years after the Act of 1640 and 15 years before the Habeas Corpus Act of 1679).

tory and constitutional. The United States recognized it as inherited common law by the Constitution, and Congress gave it into the powers of the courts in the Judiciary Act of 1789.<sup>9</sup> Numerous changes occurred by reason of the dual federal and state sovereignty and by reason of the greatly altered structure of the courts from that of the English courts. It would be impossible except in the space of a copious book to go into state laws and changes upon the subject. What is hereafter written pertains primarily to federal habeas corpus.

The judicial power of the United States clearly comprehends habeas corpus,<sup>10</sup> and the courts and judges empowered to allow or grant the writ were designated in the Judiciary Act of 1789 Section 14; but the procedure was left to be adapted and evolved from the common law. Power to "grant" the writ of habeas corpus "for the purpose of an inquiry into the cause of commitment," the great writ *ad subjudiciendum*, was given to "justices of the Supreme Court, as well as judges of the district courts." The power was not split up among courts, as it had been in England. The power to "issue" writs of habeas corpus "necessary for the exercise of their respective jurisdictions" was given to all the federal courts then established (but not to their judges), namely to the district courts, circuit courts, and Supreme Court. The circuit courts then consisted of the district judge of the district and any two justices of the Supreme Court convoked to sit in the several districts. Not until 1869 were there any "circuit judges." Those judgeships were then created,<sup>11</sup> and the circuit judges were given the powers and jurisdiction of a circuit justice allotted to the circuit.

These statutes passed into United States Revised Statutes of 1873, Section 751, giving all the courts power to issue writs of habeas corpus; Section 752, giving the "justices and judges of said courts the power to grant the great writ"; and Section 716, giving all courts power to issue writs necessary for the exercise of their respective jurisdictions, omitting to name habeas corpus but including it by necessary implication. Sections 751 and 752 have become 28 United States Code, Sections 451 and 452 (1946); and Section 716 became 28 United States Code, Section 377 (1946).

#### THE NAME "HABEAS CORPUS"—SIGNIFICANCE AND CHANGES

This name without its descriptive additions has come into customary use, which caused some obscurity and confusion until recent times when the minor writs, auxiliary and processive in the exercise of jurisdiction, had passed out of general use. The Eng-

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<sup>9</sup> ART. I, §9; 1 STAT. 81 §14 (1789).

<sup>10</sup> *Ex parte Bollman*, 4 Cranch 75, 93 (U.S. 1807) (Per Marshall, C. J.).

<sup>11</sup> 16 STAT. 44 (1869).

lish were more careful about this, usually speaking of the writ *ad subjudiciendum* as "the great writ" and giving the others their proper descriptive additions.

The Judiciary Act of 1789 Section 14 used the words "writs of habeas corpus" to name both the great writ and the other auxiliary and processive writs; the distinctions were implied from the context of the statute describing the purposes of the writs, and also from the provision that only justices or district judges were empowered to grant the great writ, while courts were empowered to issue the other writs. It became necessary to explain these differing connotations by adding to each writ and the words "habeas corpus" its descriptive characteristics, which Chief Justice Marshall did in *Ex parte Bollman*.<sup>12</sup> Section 14 of Judiciary Act of 1789 was not changed in this respect until 1873, when the laws were revised into United States Revised Statutes, Sections 751 et seq., transferring to Section 716 what had been the first sentence of Section 14 of the Judiciary Act of 1789, but omitting the words "habeas corpus." Section 716 is now 28 United States Code, Section 377 (1946). Section 753, United States Revised Statutes, otherwise relating wholly to the great writ *ad subjudiciendum* and limiting its use in federal courts to prisoners in jail or custody, added an exception "unless it is necessary to bring the prisoner into court to testify." The exception is redundant because United States Revised Statutes Section 716, 28 United States Code Section 377 (1946), without naming habeas corpus includes it when necessary to the exercise of jurisdiction;<sup>13</sup> also because upon the great writ the statute elsewhere requires production of the body of the prisoner in the court by the respondent on return to and hearing upon the writ.<sup>14</sup>

The earliest appearance of the name "habeas corpus" as revealed in accessible books was about 700 years ago. Bracton, who died in 1268, wrote of it as one of the successive writs to compel a defendant to appear and attend an action in personam. Pollock & Maitland<sup>15</sup> cite this but add in a footnote that this use of habeas corpus disappeared and was supplanted by distress; and such habeas corpus did not provide for taking and keeping the defendant to answer, but only for arresting him and bringing him into court on or near court day. Whether Bracton chose to name this writ from two of the Latin words contained in it, or whether some other person applied that name is anybody's guess. It certainly

<sup>12</sup> 4 Cranch 75, 97 (U.S. 1807) (Quoting 3 BL. COMM. 129 et seq.).

<sup>13</sup> *Price v. Johnston*, 334 U.S. 266 (1948); *Whitney v. Dick*, 202 U.S. 132, 136 (1905).

<sup>14</sup> REV. STAT. §758 (1878), now 28 U.S.C. §458 (1948); *Holiday v. Johnston*, 313 U.S. 342, 350 (1940).

<sup>15</sup> 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 593 (1911).

was an old name of known and various significance for writs of differing characteristics long before the Statute of 16 Car. I, c. 10 (1640) and the English Habeas Corpus Act of 31 Car. II, c. 2 (1679). The name was not devised for the great writ; an existing name was appropriated to it.

The two words "habeas corpus" have been called the "significant" words which gave name to the writ and remedy of habeas corpus. The objection to that is that a name should be more than merely significant of the object; it should be characteristic and distinctive unless it can mean only one thing. The characteristic words *ad prosequendum*, *ad testificandum*, etc., have been added by careful writers and judges, especially in England; but, as was stated in a preceding paragraph, American usage has been lax in this respect. And now by reason of the practical disuse of most or all of the auxiliary and processive writs of habeas corpus, it has come to pass that "habeas corpus" means the great writ which alone survives; but the old books must not be read in that way. The great writ is characteristically different in object from all the others; and surviving alone may take the name to itself without much risk of confusion. The other writs have been metamorphosed into motions and orders, or the like, bearing new names while seeking the same objects.

The word "writ" is a vestige of the times in England when all actions on the law side by private persons, or on their behalf, must have been begun only after leave had from the King, or in his name from the Lord Chancellor. This formality fell into the issuance of the writs as a matter of course, and thence in the practice of reciting in the declaration that a writ had been granted. In high prerogative actions, such as mandamus or quo warranto, they continued to originate by writ. Writs of habeas corpus, the great writ, could be granted under 31 Car. II, c. 2, only by the King's Bench (or perhaps by the Lord Chancellor) and only in criminal cases, and only upon application and a showing of probable cause and necessity.<sup>16</sup> By later statutes power to grant it was extended to other judges, and in modern English practice it is a writ of right but does not issue as of course.<sup>17</sup>

This invited the dictum that the great writ is "a high prerogative writ." Jenks says that it is not, that it is "but a merely interlocutory mandate or precept in the course of other procedures."<sup>18</sup> Chief Justice Marshall called it "a high prerogative writ, known to the common law."<sup>19</sup> Halsbury, *Laws of England*,<sup>20</sup> calls it that

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<sup>16</sup> 3 BL. COMM. 132.

<sup>17</sup> 10 HALSBURY, LAWS OF ENGLAND 41 (1909).

<sup>18</sup> *The Story of Habeas Corpus*, cited Note 1, *supra*.

<sup>19</sup> *Ex parte Watkins*, 3 Pet. 193, 202 (U.S. 1830).

<sup>20</sup> 10 HALSBURY, LAWS OF ENGLAND 39 (1909).

and cites Lord Mansfield, who did not say exactly that. Mr. Jenks, who spoke last except Halsbury must be in the right, because Halsbury<sup>21</sup> says it is a writ of right but not a writ of course. If it be a writ of right to men, it is not a prerogative of the King; and in the United States there can be no prerogative writs, except by nick-name. Besides, habeas corpus is a privilege which not even Congress or the President may suspend except as and when the Constitution permits.<sup>22</sup>

#### THE GREAT WRIT AND THE AUXILIARY OR PROCESSIVE WRITS—PURPOSES

While all this was going on in England, and probably long before the emergence of the great writ, various auxiliary and processive writs of habeas corpus were devised and originated, the objects of which were not for relief of the prisoner from durance. Some of them were civil processes to bring persons into court who were not imprisoned or detained. By changes and improvements in procedure most of these auxiliary writs have fallen into disuse, their objects being accomplished through simpler procedure. Their functions, so far as needed, remain but their names are lost. With few exceptions they have been superseded in England by other process and procedure to effect their purposes.<sup>23</sup>

Mr. Jenks says<sup>24</sup> that the great writ originated not in vague assertions of the right of liberty, but in the practice of arrest on mesne process. As a fact in legal history the processes of arrest on mesne process, and of execution against the body of defendant, grew up in lieu of *capias* with civil bail or release upon undertaking. The *capias* and arrest, now superseded, was in its time a supersedure of the habeas corpus *ad satisfaciendum*. The early habeas corpus suggested by Bracton in the 13th century to bring a defendant into court to answer a declaration in personam was superseded by distress.<sup>25</sup> The general abolition of imprisonment for debt would have made these writs and procedure obsolete, even if the structures of American courts admitted of the use of habeas corpus to bring one under civil arrest into another court for execution.

In order to identify the auxiliary and processive writs of habeas corpus, now obsolete or nearly so, it is fitting to name and describe them. Chief Justice Marshall in *Ex parte Bollman*<sup>26</sup> states

<sup>21</sup> 10 HALSBURY, LAWS OF ENGLAND 41 (1909).

<sup>22</sup> U. S. CONST. ART. I §9; *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866).

<sup>23</sup> HALSBURY, LAWS OF ENGLAND 39 n. (d) (1909).

<sup>24</sup> *The Story of Habeas Corpus*, cited note 1, *supra*.

<sup>25</sup> See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 593 (1911).

<sup>26</sup> 4 Cranch 75, 97 (U.S. 1807).

that they are stated and described accurately in 3 Blackstone's *Commentaries* 129, as follows:

*Habeas corpus ad respondendum* to take a man confined by Process of an inferior court to charge him in the court above.

[That is now accomplished in some courts, when needed, by an order transferring the case and is not always limited to prosecutions where the prisoner is confined under process. See various state criminal laws.]

*Habeas corpus ad satisfaciendum* to bring a prisoner charged in judgment into a higher court to charge him by execution.

[Marshall says: "This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it."]

*Habeas corpus ad prosequendum, testificandum, deliberandum*, etc., to bring a prisoner into court that he may prosecute or testify therein or be tried therein.

[*Ad prosequendum* to bring a prisoner into the proper court to be tried appears to have been the writ actually used in *Virginia v. Paul*<sup>27</sup> to bring a prisoner indicted in a state court for removal into a Federal court for trial; but the proper writ for that purpose was held to be *habeas corpus ad faciendum*, etc., *cum causa*, under United States Revised Statutes, Section 643, 28 United States Code, Section 76 (1946) and not a writ under United States Revised Statutes, Section 753, 28 United States Code, Section 453 (1946). *Ad testificandum* is preserved by 28 United States Code, Section 453, last clause, although 28 United States Code, Section 377 seems to have been a better place for it; unless its use to bring a state prisoner into a federal court to testify was designed to be covered. Any use of it must be rare. In *Ex parte Dorr*,<sup>28</sup> it is said that no Federal court or judge can bring a prisoner from custody under a state court's sentence "for any other purpose than to be used as a witness." The Removal Acts<sup>29</sup> as regards this process were based on 4 Statutes at Large 633 (1833), which was in effect when *Ex parte Dorr*, *supra*, was decided in 1845; hence the language in the opinion is too broad. In spite of the *Dorr* dictum it must be doubted whether a state prisoner can be brought to testify in a federal court except in a very necessitous case, if at all. A deposition would meet most cases.]

*Habeas corpus ad faciendum et recipiendum*, otherwise *habeas corpus cum causa* to remove the action against the person detained in an inferior (or other) court into a higher or proper court for trial.

[This was formerly used to bring a prisoner from a federal dis-

<sup>27</sup> 148 U.S. 107 (1892).

<sup>28</sup> 3 How. 103, 105 (U.S. 1845).

<sup>29</sup> REV. STAT. §643 (1878).



trict in which he was arrested into the proper district for trial, but that is now superseded by Federal Rules of Criminal Procedure, 40 (b) (3). The same writ is authorized by 28 United States Code, Section 75 (1946),<sup>30</sup> when procedure for removal of certain state criminal cases is complete, to bring the prisoner to the Federal court for trial.]

*Habeas corpora juratorum* was a writ to bring the jurors into court in the English Common Pleas.

[A *venire facias* under 28 United States Code, Section 416 (1946) is used in federal courts to summon jurors.]

A few other auxiliary or processive writs of habeas corpus were used before Blackstone's time, but they need not be pursued here.

Although the distinctions between habeas corpus *ad subjudiciendum* (an original writ and remedy) and the auxiliary and processive writs of habeas corpus were well recognized in England; the 14th section of the Judiciary Act of 1789<sup>31</sup> in its first sentence empowered "all" the "courts" of the United States "to issue writs of scire facias, habeas corpus, and all other writs, not especially provided for by statute, which may be *necessary for the exercise of their respective jurisdictions.*" [Italics supplied.] The second sentence provided that "either of the *justices* of the Supreme Court, as well as the *judges* of the district courts, shall have the power to grant writs of habeas corpus, *for the purpose of inquiry into the cause of commitment.*" This embodiment in one section of two different kinds of habeas corpus invited confusion which appeared eighteen years later in *Ex parte Bollman*.<sup>32</sup> Counsel argued at length that the Supreme Court had power to issue the writ *ad subjudiciendum* under the first sentence of Section 14 to liberate Bollman held for trial for treason, although the trial was not one within the original jurisdiction of the Supreme Court conferred by Article III of the Constitution. The argument ran that the first sentence was a general grant of power unlimited to the necessities of any particular jurisdiction. Chief Justice Marshall rejected that argument pointing out that the two classes of habeas corpus are distinct, the first class in the first sentence being accessory to some jurisdiction invoked in the issuing court, and the second class being an original writ grantable by *justices* or *judges* to institute inquiry into the lawfulness of the commitment of the petitioner. The writ was accordingly granted under the power given by the second sentence of Section 14 and all common law jurisdiction over the prosecution in the Supreme Court was expressly disclaimed.<sup>33</sup> On return to the writ the petitioner was discharged because his

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<sup>30</sup> REV. STAT. §642 (1878).

<sup>31</sup> 1 STAT. 81 (1789).

<sup>32</sup> 4 Cranch 75 (U.S. 1807).

<sup>33</sup> *Ex parte Bollman*, 4 Cranch 75, 93-100 (U.S. 1807).

commitment for trial, whereby he was detained, was based on affidavits which showed that no such crime had been committed.<sup>34</sup> This decision established in the federal courts the distinctions and differences in the two classes of habeas corpus.

In 1912 the first sentence of Section 14 of Judiciary Act of 1789, had been transferred into United States Revised Statutes, Section 716, and then became Judicial Code Section 262, which in turn became United States Code, Section 377. All of these omitted the words "habeas corpus," contained in the first sentence of Section 14 of the Judiciary Act of 1789; but it remained within the meaning of 28 United States Code, Section 377, as was determined in *Whitney v. Dick*;<sup>35</sup> *Price v. Johnston*.<sup>36</sup> The latest case again distinguishes the two classes of habeas corpus, but recognizes that habeas corpus of the first class remains available, if needed for the exercise of jurisdiction.

#### CHANGES MADE BY THE SHOW-CAUSE PROCEDURE

The development of the procedure upon an application for the great writ by ordering the respondent to show cause why the writ should not issue made a great change in habeas corpus procedure, and even some in the hearing on the writ and return when it was allowed and had issued.

Today when one speaks of habeas corpus, it is fairly safe to assume that he is speaking of the great writ *ad subjudiciendum*; but it is not at all safe to assume that he is speaking of that writ allowed, issued, and in operation. He may be speaking of a protean change of procedure by which a preliminary inquiry is made by a show-cause order, the answer thereto (often called a "return"), and the hearing to determine whether the applicant is entitled to the writ. If that is decided in his favor the writ then issues and the case goes on to a hearing on the writ; if against his application, the writ may be denied, probably in some instances without prejudice to a new application or to amendment.

The show-cause proceeding is not ancient. Its propriety was recognized in *Ex parte Watkins*,<sup>37</sup> in 1830; again in *Ex parte Milligan*,<sup>38</sup> *Ex parte Yarbrough*,<sup>39</sup> and *Ex parte Collins*.<sup>40</sup> The show-cause proceeding is one to obtain the writ, *for* it but not *upon* it; though it may decide some or all of the questions which

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<sup>34</sup> *Ex parte Bollman*, 4 Cranch 75, 136 (U.S. 1807).

<sup>35</sup> 202 U.S. 132, 136 (1905).

<sup>36</sup> 334 U.S. 266 (1948).

<sup>37</sup> 3 Pet. 193, 196 (U.S. 1830).

<sup>38</sup> 4 Wall. 2, 110 (U.S. 1866).

<sup>39</sup> 110 U.S. 651 (1883).

<sup>40</sup> 154 Fed. 980, (C.C. N.D. Cal. 1907), *aff'd* 214 U.S. 113 (1908).

could have been made upon the writ and return. It is adapted to frame preliminary issues of law and fact like a dilatory plea or demurrer. The show-cause proceeding and the proceeding on the writ itself are not the same, although both or either may be called a "habeas corpus proceeding" (are so-called in 28 United States Code, Section 463), and though the same question might have been decided in either. Even Proteus could not have excelled that metamorphosis. In fact there is one leading case wherein all the issues were fully tried in the show-cause proceeding, whereupon the parties stipulated that the answer to the show-cause proceeding and a traverse of that answer should stand as a return to the writ, and that the traverse of the answer should stand as a traverse of a return to the writ, whereupon the writ issued and judgment was given.<sup>41</sup> That might have caused a lifting of eyebrows in the King's Bench two centuries earlier. To have determined the merits of the writ upon an application for it was an innovation, possibly a risky one; but it worked.

The show-cause procedure is in use in England. For about a century it has been usual to grant a rule nisi on an application for a writ in the first instance; and only in urgent cases to grant a rule absolute for issuance of the writ.<sup>42</sup>

Since 1867 it has been provided by statute that upon application the writ shall issue "forthwith . . . , unless it appears from the petition itself that the party is not entitled thereto."<sup>43</sup> That was 37 years after *Ex parte Watkins*,<sup>44</sup> the use of a show-cause order was sanctioned. If the word "forthwith" had been intended to deprive the judge of any discretion to withhold the writ except when the application was on its face self-defeating—an unreasonable construction—that construction was not given in later decisions.<sup>45</sup> Had there been any question that discretion is left to resort to a show-cause proceeding, it is removed by the recently enacted Revised Judicial Code and Judiciary Title, 28 United States Code, Section 2243, which authorizes either the award of the writ or a show-cause order "unless it appears from the application that the applicant or person detained is not entitled thereto."

A consummate statement of the procedure open to the judge who entertains an application for habeas corpus, and of the alterna-

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<sup>41</sup> *Ex parte Duncan*, 146 F. 2d 576, 577 (9th Cir. 1944), *Rev'd on Merits But Not on Procedure* 327 U.S. 304 (1945).

<sup>42</sup> 10 HALSBURY, LAWS OF ENGLAND 60 (1909), citing *Eggington's Case*, 2 E. & B. 717, 734 (1853).

<sup>43</sup> 14 STAT. 385 (1869); REV. STAT. §755 (1878), 28 U.S.C. §455 (1946).

<sup>44</sup> 3 Pet. 193, 196 (U.S. 1830).

<sup>45</sup> *Ex parte Royall*, 117 U.S. 241 (1886) [on authority of *Ex parte Watkins*, 3 Pet. 193, 201 (U.S. 1830); *Ex parte Collins*, 154 Fed. 980 (C.C. N.D. Cal. 1907), *aff'd*, 214 U.S. 213 (1909)].

tives of action thereon, is given in *Dorsey v. Gill*,<sup>46</sup> opinion by Justice Miller of the Court of Appeals of the District of Columbia. He enumerates ten possible alternatives, describing each, from which the judge must choose with appropriate discretion. The one which the district judge chose was to deny the writ, and the Court of Appeals sustained him by dismissing the appeal.

Earlier cases did not very explicitly describe the procedure on a show-cause order, leaving it to be deduced from reported decisions;<sup>47</sup> but in *Ex parte Collins*,<sup>48</sup> an order to show cause was made, "return" or answer was made, and objection to that procedure was made below, but upon appeal the procedure was approved. It has now become statutory.<sup>49</sup>

#### CHANGES MADE BY FIRST EIGHT AND FOURTEENTH AMENDMENTS

The Fifth Amendment guarantees to every person that he shall not be deprived of liberty "without due process of law," and the Fourteenth that "no State" shall so deprive him. They hark back to Magna Carta which contained the equivalent words, "the law of the land." The great writ was devised in England to effectuate this guarantee. It was a remedy against illegal imprisonment by departure from due process of law. Neither these two amendments nor the English Habeas Corpus Act of 1679 nor the federal habeas corpus acts have essayed to define and catalogue those departures from due process which will support a grant of the writ. That in recent times the concept of due process in criminal prosecutions has been liberalized and enlarged may not be denied; but in plain thought that did not change the character, scope, or reach of the great writ; it merely increased the occasions for it. The procedure to obtain the writ and the procedure upon it were not affected by the Amendments. If there was any change it was in the interpretations of "due process of law," and in regarding as departures therefrom some actions or omissions in prosecutions previously regarded as errors corrigible by appeal or writ of error or new trial, but not by collateral attack by habeas corpus.<sup>50</sup>

#### CHANGES MADE BY PROVISIONS FOR APPEALS

A right of appeal or a right to a writ of error to the refusal to grant the writ of habeas corpus, or to the grant of it, or to the

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<sup>46</sup> 148 F. 2d 857, 865 (D.C. Cir. 1945) (before the late revision).

<sup>47</sup> See *Ex parte Watkins*, 3 Pet. 193, 196 (U.S. 1830) [referring to *Ex parte Kearney*, 7 Wheat. 38 (U.S. 1822)].

<sup>48</sup> 154 Fed. 980, 982 (C.C. N.D. Cal. 1907).

<sup>49</sup> Revised 28 U.S.C. §2243 (1948).

<sup>50</sup> The federal decisions upon the grounds which will support such collateral attack are collated in Peters, *Collateral Attack by Habeas Corpus*, 23 WASH. L. REV. 87 (1948).

judgment upon hearing upon the writ and return, exists only by virtue of statute. In ordinary actions a writ of error would not lie to an interlocutory order, and the grant or denial of the writ is interlocutory in form. Consequently the refusal or grant of the originating writ of habeas corpus was irreviewable; and for the same reason the issuance of any of the auxiliary and processive writs of habeas corpus—incidents in the course of a case—were irreviewable at common law.

In the federal courts no appellate review of habeas corpus proceedings was provided for by the Judiciary Act of 1789. The writs of error or appeals allowed by that Act were limited to cases capable of a money valuation.<sup>51</sup> Habeas corpus cases resulted in no such reviewable judgment.<sup>52</sup> In 1866 the famous case of *Ex parte Milligan*<sup>53</sup> was heard in the Supreme Court upon a certification of questions upon division of opinions in the circuit court, made under Act of April 29, 1802, Section 6.<sup>54</sup> The certified questions were accepted under that Act, which was held to be applicable to habeas corpus proceedings.<sup>55</sup> This was the nearest approach to a review at that time.

A right of appeal was first given in federal courts by the Act of 1867,<sup>56</sup> which passed into United States Revised Statutes, Section 763 and that with amendments into 28 United States Code, Sections 463, 464. This appeal was and is peculiar in that it laid to a "final decision . . . upon an application for a writ of habeas corpus or upon such writ when issued," as enacted in 1873 and to "the final order" made "in a proceeding in habeas corpus in a district court" under 28 United States Code, Section 463(a). In Revised Title 28, United States Code, Section 2253, the words "district court" have been changed to read "circuit or district judge" with a result that none may safely predict.<sup>57</sup> "All final decisions" by district courts, including of course those in habeas corpus cases when heard on the writ and return, are appealable to the proper

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<sup>51</sup> See 1 STAT. 84 §22 (1789).

<sup>52</sup> *Pratt v. Fitzhugh*, 1 Black 271, 272 (U.S. 1861); *Barry v. Mercein*, 5 How. 103, 119 (U.S. 1847).

<sup>53</sup> 4 Wall. 2, 4, 108 (U.S. 1866).

<sup>54</sup> 2 STAT. 159 (1802).

<sup>55</sup> 4 Wall. 109 (U.S. 1866).

<sup>56</sup> 14 STAT. 386 §1 (1867).

<sup>57</sup> A circuit judge may grant the writ or, impliedly refuse it, but his order must be "entered in the records of the district court;" or he may "decline to entertain" the application for the writ and transfer it to the district court (Revised 28 U.S.C. §2241 [a,b]). The question at once arises whether a circuit judge entertaining the application and making a show-cause order, or otherwise having a hearing, is acting as a district judge or as the district court. If he acts as a circuit judge, the appeal would go to his own court or appeals where he would be disqualified.

Court of Appeals, save those appealable directly to the Supreme Court.<sup>58</sup> The great change effected by creation of a right of appeal in these terms was to elevate the issuance or refusal of the writ into a *proceeding and order* having finality for purpose of review; and the appellate judgment is also a change in that by reversal the proceeding may go back to the district court for further procedure, or by affirmance for further procedure. At common law nothing remained but the right to apply again.

It is conjecturable, if not provable, that the evolution of the show-cause procedure under way from 1830 to 1867 may have been an inducing cause for the creation of a right of appeal in the Act of 1867 to include decisions preliminary to judgment upon hearing of the issued writ and return to it. If the Act had not given the right, a decision upon application denying the writ would have remained irreviewable, however grave and final its consequences.

#### RES JUDICATA AND COLLATERAL ATTACK AND CHANGES THEREIN

The doctrine of *res judicata* has not been applied to its full and conventional extent in habeas corpus in the federal courts. The doctrine of collateral attack is involved only in the scope and reach of habeas corpus to invalidate judgments in a prosecution for crime with sentence to imprisonment, or to invalidate other proceedings detaining a prisoner for trial for crime, or nonjudicial proceedings detaining him for other reasons, such as for deportation as an alien. Essentially habeas corpus is a collateral attack on the proceeding or process of detention.<sup>59</sup>

A judgment in habeas corpus discharging the prisoner upon a hearing upon facts and law and upon the writ and return thereto is conclusive of his right to remain at liberty,<sup>60</sup> even if he had been held under a state detention or sentence.<sup>61</sup> If, however, his detention was merely preliminary to trial, his discharge is conclusive only as to the grounds determined.<sup>62</sup> And when the order discharging him is reversed on appeal by respondent, the Government may retake him or further detain him, if there be further cause for so doing.<sup>63</sup> Generally, a denial of the writ, or a remand on hearing on the writ and return, of the prisoner to the custody of respondent is not a bar to successive applications for the writ. That has been the law hitherto. The doctrine of *res judicata* did

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<sup>58</sup> 28 U.S.C. §225 (a) (1946), now revised 28 U.S.C. §129 (1948).

<sup>59</sup> See Peters, *Collateral Attack By Habeas Corpus*, 23 WASH. L. REV. 87 (1948).

<sup>60</sup> *Morse v. United States*, 267 U.S. 80 (1924).

<sup>61</sup> *Cunningham v. Neagle*, 135 U.S. 1 (1889) [affirming 39 Fed. 833 (1889)].

<sup>62</sup> *Morse v. United States*, *supra*, note 59.

<sup>63</sup> *Haddox v. Richardson*, 168 Fed. 635, 641 (4th Cir. 1909).

not apply to bar successive applications in such a situation.<sup>64</sup>

As this is written the Revised Title 28, United States Code, has become law. It contains a new habeas corpus act which makes great changes. The application is required to be more specific and may be amended or supplemented (Section 2242); show-cause order is sanctioned by statute (Section 2243), and successive writs after a determination of the legality of detention are banned if "the petition present no new ground not theretofore presented and determined, and [if] the judge or court is satisfied that the ends of justice will not be served by such inquiry (Section 2244)." Obviously this is not a rule of *res judicata* absolute; the court or judge for the ends of justice may "entertain" a new application on the old ground for the sake of justice, but entertaining it he is not bound to grant another writ. A further and wholly new provision is that in Section 2255 of Revised Title 28, which provides for a motion *in the trial court* "to vacate, set aside, or correct the sentence" by a federal court and provides that such a motion "may be made at any time." A second or successive motion is banned. Thus far the remedy by motion in the trial court is a criminal remedy, it would seem, supplementing a motion for new trial or in arrest or for correction of sentence. It is not a part of the civil remedy by habeas corpus. It belongs logically in Revised Title 18, United States Code (Criminal Code), or else in Federal Rules of Criminal Procedure which must govern such motions except as Section 2255 provides otherwise.<sup>65</sup> The order on such a motion is appealable (Section 2255, next to last paragraph).

But in its last paragraph Section 2255 becomes a statute for habeas corpus; it bans "entertainment" of application for habeas corpus by prisoner authorized to make such a motion in the trial court, if it appears that he failed to apply for relief by such a motion, or if such a motion was made and denied, unless "it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him," or that, if the motion was made and denied, "it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention" (last paragraph, Section 2255). This also does not impose *res judicata* absolutely. The ban on "entertainment" of an application is not the same as a ban on the grant of the writ, which would imply consideration and determination of the application. To make a show-cause order would involve consideration of the application by a hearing upon that order. If a show-cause order were made it would likely "appear" by the answer to the order whether the applicant had failed to move in the trial court when he might

<sup>64</sup> *Salinger v. Loisel*, 265 U.S. 224, 230 (1923); *Wong Doo v. United States*, 265 U.S. 239, 240 (1923).

<sup>65</sup> See FED. R. CRIM. P., 1, 54.

effectively have done so. It would seem logical then to conclude that under this new law the application first made should by positive allegation assert or deny every fact that under either Section 2244 or Section 2255, last paragraph, would operate to ban "entertainment" of the application. That is to say, the application should show that it is not a second or successive one and that the right to move in the trial court was not ignored or would have been ineffective. If the application is a second one, that should be stated with facts sufficient to warrant "entertainment" according to Sections 2244 and 2255. Changes in procedure here impend, and the courts may determine their nature and extent.

#### EPILOGUE — CHANGES TO COME

The simile of the procedure for and upon the great writ to the behavior of Proteus is not strained. Just as the suppliants of Proteus had to lay firm hold on him and cling sturdily until he ceased his apparitional antics and gave the desired information; so must the applicant for habeas corpus make application fair and complete on its face, and he must face all ten of the alternatives described in *Dorsey v. Gill*,<sup>66</sup> all but one of which will defeat or prolong his application. If he evades all but that one—a grant of the writ—he faces further trials by procedure on the writ, return, and traverse of the return. If he has a case, is steadfast and persistent, and proves it, the writ and judgment thereon will liberate him.

This procedure is designed to protect the privilege of the writ for those who deserve it against abuses of the privilege by those who do not deserve it and who clamor for it incessantly. The courts have been liberal and generous to applicants for the writ; they will continue to be so.

The scope, reach, and objects of the great writ have stood unchanged through three centuries, but through those centuries the procedure has changed often. The auxiliary and processive writs are almost superseded by more modern methods to the ends they sought.

No one may suppose that procedural changes have ended in habeas corpus. This is one of the epochs of procedural change, the epoch of court-made rules of procedure to achieve simplicity, clarity, and celerity. There will be changes. Nearly 1000 years ago a Syrian poet wrote:

The good law and the bad laws disappear  
Below the flood of custom, or they float,  
And like the wonderful Sar'aby coat  
They captivate us for a little year.<sup>67</sup>

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<sup>66</sup> 148 F. 2d 857, 865 (D.C. Cir. 1945).

<sup>67</sup> LXXVIII from *The Diwan of Abu'l Ala*.



When this article was being written a bill was pending in Congress to revise the United States Judicial Code and Judiciary law. As the writing ended that bill became law as the new Title 28 of United States Code. It makes changes to come.

